University of Miami Law School
Institutional Repository

University of Miami Law Review

12-1-1986

Monfort of Colorado, Inc. v. Cargill, Inc.: Standing to Enjoin Horizontal Mergers by Competing Companies

Michelle Cuervo Donaj

Follow this and additional works at: http://repository.law.miami.edu/umlr

Part of the Antitrust and Trade Regulation Commons

Recommended Citation

Michelle Cuervo Donaj, *Monfort of Colorado, Inc. v. Cargill, Inc.: Standing to Enjoin Horizontal Mergers by Competing Companies*, 41 U. Miami L. Rev. 385 (1986)
Available at: http://repository.law.miami.edu/umlr/vol41/iss2/5

This Casenote is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Monfort of Colorado, Inc. v. Cargill, Inc.: Standing to Enjoin Horizontal Mergers by Competing Companies

I. INTRODUCTION

On June 17, 1983, Excel, a wholly-owned subsidiary of Cargill, Inc. and the nation's second largest beef packer, signed an agreement to acquire Spencer Beef, the third largest beef packer.[1] Monfort, the fifth largest competitor in the beef packing industry, brought suit to enjoin the proposed merger pursuant to sections 7 and 16 of the Clayton Act.[2] The United States District Court for the District of Colo-

1. Monfort of Colo., Inc. v. Cargill, Inc., 591 F. Supp. 683 (D. Colo. 1983), *aff'd*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986).

2. Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 572 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986). Section 7 of the Clayton Act provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act § 7, 15 U.S.C. § 18 (1982).

Section 16 of the Clayton Act provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in

rado issued a permanent injunction prohibiting the proposed acquisition of Spencer Beef and the defendant Excel appealed.[3] The United States Circuit Court of Appeals for the Tenth Circuit *held*, affirmed: A company has standing to obtain an injunction under section 16 enjoining a competitor's acquisition of a competing firm where the plantiff establishes a significant threat of injury causally related to the acquisition, which is likely to result in a substantial lessening of competition in the industry. *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986).[4]

Prior to 1984, no federal court had determined whether a competitor could allege a sufficiently plausible theory of threatened antitrust injury to obtain an injunction against a competitor's proposed horizontal merger.[5] Four recent federal court decisions issued prior to *Monfort*, however, addressed competitors' claims of antitrust injury and granted standing to private companies seeking to enjoin competitors' mergers.[6] In each case, the courts looked beyond any immediate benefits of the mergers and found that the long-term effects of increased concentration resulting from the acquisition adversely

---

> respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Clayton Act § 16, 15 U.S.C. § 26 (1982).

3. The district court permanently enjoined the proposed acquisition based upon its findings that:

> 1. Monfort has standing to challenge the proposed acquisition;
>
> 2. The twelve state regional market for the procurement of fed cattle and the national market for the sale of boxed beef constitute economically significant markets or submarkets within the beef industry for purposes of analyzing the proposed acquisition under Section 7 of the Clayton Act;
>
> 3. The proposed acquisition may substantially lessen competition in the regional market for the procurement of fed cattle and the national market for the sale of boxed beef in violation of Section 7 of the Clayton Act; and
>
> 4. Monfort is threatened with significant loss or damage within the meaning of Section 16 of the Clayton Act as a result of the proposed acquisition, and injunctive relief should enter to prevent threatened violations of the Act.

Monfort, 591 F. Supp. at 688.

4. The court also affirmed the district court's holding that its order covered Excel's subsequent acquisition of one of the three Spencer Beef plants, and thus Excel had violated the December 2, 1983 permanent injunction order by its December 30, 1983 acquisition of the Oakland, Iowa plant. *Monfort*, 761 F.2d at 582.

5. Note, *Horizontal Mergers, Competitors, and Antitrust Standing Under Section 16 of the Clayton Act: Fruitless Searches for Antitrust Injury*, 70 MINN. L. REV. 931 (1986). The author argued that courts should not grant standing to competitors because their claims of "antitrust injury" are usually based upon speculative allegations of predatory behavior. *Id.* at 953.

6. Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985); Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354 (6th Cir. 1985), *cert. denied*, 105 S. Ct. 1155 (1985); White Consol. Indus. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio 1985), *injunction vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985); Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984).

threatened overall competition in the market.[7]

The significance of the *Monfort* decision is that the court granted

---

7. In Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., the Court of Appeals for the First Circuit granted standing to a wholesale/retail gasoline seller to seek injunctive relief against the proposed merger of a competitor oil company. 754 F.2d 404, 408 (1st Cir. 1985). The court stated:

> We cannot conceive of a more appropriate plaintiff to challenge defendants' merger. Caribe is a direct competitor of defendants in the refined gasoline market. The gravamen of its complaint is that defendants' merger tends to lessen competition and to yield a greater concentration of firms within that market. Caribe acknowledges that it has not sustained an actual measurable injury in the short term flowing from the merger, but it correctly claims that this is not required for a § 16 action; its allegations that the refined gasoline market has been harmed by these putative antitrust violations and that it will likely be "squeezed" out of the market in the foreseeable future because of defendants' actions are sufficient. Accordingly, we rule that Caribe has alleged sufficient facts showing it " 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and is 'likely to be redressed by a favorable decision.' "

Id. at 408 (citations omitted).

The United States Court of Appeals for the Sixth Circuit in Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., held that two brewers had standing to enjoin the proposed merger of competing brewers based upon their allegations that the merger would impair the ability to wholesale and distribute their products because the defendants' increased economic power would induce distributors to drop the plaintiffs as suppliers. 753 F.2d 1354, 1357 (6th Cir. 1985), *cert. denied*, 105 S. Ct. 1155 (1985). Despite the defendants' argument that any increase in prices would benefit the plaintiff/competitors, the court found that the harm plaintiffs alleged was "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 1357 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 489 (1977)).

In White Consolidated Industries v. Whirlpool Corp., Inc., an appliance manufacturer sought to enjoin a competitor's acquisition of a dishwasher manufacturer. 612 F. Supp. 1009 (N.D. Ohio), *injunction vacated*, 619 F. Supp 1022 (N.D. Ohio 1985). The court found that statistical evidence in the form of high four-firm concentration ratios and high Herfindahl-Hirschman Index numbers constituted a prima facie case that the proposed merger would have anticompetitive effects. *Id.* at 1031. Even though the court rejected as "too speculative" the plaintiff's contention that the merger would result in predation, leverage, and collusion by defendants, it nonetheless concluded that the high concentration levels provided substantial evidence of an anticompetitive effect upon the market and granted the competitor's request for an injunction. *Id.* at 1031-32. (The court subsequently vacated the injunction because an amendment to the supply contract accompanying the proposed merger served to protect adequately the viability of a competing manufacturer's ability to act as a post-transaction check upon the merged company's increased economic power. White Consol. Indus. v. Whirlpool Corp., 619 F. Supp. 1022 (N.D. Ohio 1985)).

In Chrysler Corp. v. General Motors Corp., defendants moved to dismiss for failure to state a claim upon which relief may be granted. 589 F. Supp. 1182 (D.D.C. 1984). The court refused to grant the motion and found that an automobile manufacturer had standing to seek injunctive relief against two competitors contemplating a joint venture to produce a new automobile. *Id.* at 1187-94. The court stated: "Chrysler alleges, and for the purpose of this motion, the Court must accept that its injury derives not from the mere existence of a joint venture, but from the fact that the joint venture parents are GM and Toyota, the first and third largest automobile companies in the world." *Id.* at 1193.

Monfort standing to enjoin the proposed merger despite the possibility that an alternative price leadership scenario could occur under which Monfort would not itself be injured (even though consumers and competition would suffer).[8] The Supreme Court has granted certiorari in the *Monfort* case[9] and should definitively establish the type of threatened injury a competitor must establish to obtain an injunction blocking a horizontal merger.

This Note analyzes the rationale for granting competitors standing to enjoin mergers that result in unduly concentrated markets. Part IIA discusses the need for private enforcement actions to supplement those actions that the administration brings at its discretion. Part IIB outlines the conflicting theories of the Chicago and Harvard School approaches to antitrust enforcement policies focusing upon studies by Harvard School economists which indicate that market structures characterized by high levels of concentration lead to anticompetitive practices (contrary to the prevailing views of the current administration). Part III argues that regardless of the validity of either school of thought, the fact that there are conflicting viewpoints emphasizes the importance of ensuring that judicial development of antitrust policy is not limited to the dictates of just one economic theory. The conclusion, therefore, is that courts should grant competitors standing to seek review of potentially illegal mergers where there is a threat of antitrust injury and where the government has chosen not to bring suit. Because there is no incentive in the short-term for private parties other than competitors to challenge proposed mergers, disallowing competitors' suits would result in restricting judicial review to only those mergers that offend the economic doctrines utilized by the current administration.

II. PRESERVING COMPETITION BY PREVENTING ECONOMIC CONCENTRATION

A. *Private Enforcement of Antitrust Laws*

In devising a framework for the enforcement of antitrust policies, Congress considered whether the public interest would best be served by providing for private actions under the antitrust laws or by limiting antitrust enforcement to governmental actions.[10] Congress finally

8. *See infra* note 71.

9. Cargill, Inc. v. Monfort of Colo., Inc., 106 S. Ct. 784 (1986).

10. 21 CONG. REC. 2551 (1890) (statements of Sen. Reagan). Congress was concerned that while "[r]ich corporations and rich men may . . . the great mass of people are not able to employ counsel." *Id.* at 2564. Thus, those whom Congress intended to be the primary beneficiaries of the antitrust policies would not have any meaningful access to the courts while

provided for both governmental and private rights of action, and in so doing it created incentives in the antitrust laws to actually encourage private enforcement actions as a means of supplementing governmental enforcement.[11] For this reason Congress provided for a prevailing plaintiff to recover treble damages as well as attorney's fees (and did not provide for a prevailing defendant to recover attorney's fees).[12]

Congress sought to encourage private enforcement actions because it perceived governmental resources to be inadequate to provide vigorous enforcement of antitrust policies.[13] In addition, this private attorney general concept would provide effective enforcement at the expense of the wrongdoers and not at the expense of the taxpayers. Thus, Congress clearly intended private enforcement actions to be a major part of antitrust policy.

To ensure that potential antitrust plaintiffs are able to secure the quality counsel required to bring such complex and difficult litigation, courts established the "lodestar" concept of awarding attorney's fees to prevailing plaintiffs.[14] The lodestar concept encourages attorneys to undertake plaintiffs' antitrust cases because the award of attorney's fees is calculated by multiplying the higher hourly rates in effect at the

---

"rich corporations and rich men" would become the only antitrust plaintiffs able to afford a remedy. *See also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) (The Supreme Court recognized that Congress's intent in passing statutes allowing for reasonable attorney's fees was to rely heavily upon private enforcement to implement public policy and referred to "[f]ee-shifting in connection with treble-damages awards under the antitrust laws [as] a prime example" of the emphasis upon private suits.).

11. 21 CONG. REC. 2551, 2564 (1890).

12. ABA ANTITRUST SECTION, MONOGRAPH NO. 1, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION VII OF THE CLAYTON ACT POLICY AND LAW 13-18 (1977). The concern over awarding attorney's fees to prevailing defendants was the fear that such a policy would deter private plaintiffs from enforcing antitrust laws. As one court stated:

> It is well known that a primary objective of the private treble damage suit is to provide a means for enforcement of the antitrust laws in addition to government prosecutions. The incentive which the prospect of treble damages provides for instituting private antitrust actions would be dampened by the threat of assessment of defendant's attorneys' fees and other costs as a penalty for failure.

Id. at 15 (quoting Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3d Cir. 1967)); *see also* P. JONES, LITIGATING PRIVATE ANTITRUST ACTIONS 46 (1984) (awarding reasonable attorney's fees and costs to prevailing plaintiffs is mandatory in both treble-damage actions and suits for injunctive relief).

13. ABA ANTITRUST SECTION, *supra* note 12, at 13-18.

14. P. JONES, *supra* note 12, at 546-47. The author observed that the "lodestar" approach to calculating attorney's fees based upon multiplying the number of hours worked by current hourly rates "is now well established . . . as the proper method of computation of attorneys' fees in antitrust cases." *Id.* at 547 (footnote omitted). The court initially developed the lodestar approach in Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I), and later refined it in Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (Lindy II).

conclusion of the case times the total number of hours expended throughout.[15] A court may increase this sum at its discretion by using a multiplier based upon the complexity of the particular case. The courts have further implemented congressional policy to encourage private enforcement by providing that the attorney's fees awardable under the "lodestar" principle are not limited by damages recovered, and, in fact, may be many times the plaintiff's actual damages in a meritorious case.[16] Accordingly, a prevailing plaintiff may be awarded attorney's fees even though he receives only one dollar in damages or injunctive relief and no actual damages.[17]

Encouraging private antitrust actions also ensured that there would be a pluralism in the development of antitrust doctrine as well as in the enforcement of the antitrust laws.[18] Many different schools

15. P. JONES, *supra* note 12, at 547, 560.

16. *Id.* at 548-50.

17. *Id.* Professor Jones noted that in order for a plaintiff seeking injunctive relief pursuant to section 16 of the Clayton Act to obtain attorney's fees, he need only have "substantially prevailed." Thus:

> Where an action is brought to enjoin a corporate takeover and the takeover bid is abandoned after a preliminary injunction has been granted, the fact that no final judgment is entered in the case does not preclude an award of attorneys' fees. The fact that the takeover bid was abandoned as a direct consequence of the preliminary injunction is a sufficient basis upon which to conclude that the plaintiff *substantially prevailed* in the action. The appropriate benchmarks in determining whether a party has substantially prevailed are the situation immediately prior to the commencement of the suit, the situation upon completion of the suit, and the role, if any, played by the litigation in effecting any changes between the two.

Id. at 555 (citations omitted).

18. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 10-13 (1977). Professor Sullivan recognized that Congress intended for antitrust doctrines to be developed and implemented as a system of law. He stated:

> In enacting the antitrust laws Congress had in view other desiderata in addition to the one to which economics grants recognition. The courts have an obligation to attend all of these goals, not just the one which economists also sanction. Thinking and writing about the law as though rational resource allocation were the only goal can only lead to confusion.
>
> Among the non-economic goals of antitrust, all quite tenable as policy objectives, are a preference for decentralization of economic power, reduction of the range within which private discretion may be exercised in matters materially affecting the welfare of others, enhancement of the opportunity for more people to exercise independently entreprenuerial impulses, and, most blatantly, a social preference for the small rather than the large—if you will, a nostalgia for that mythical past when social, governmental and economic organization was simpler, more comprehensible. Antitrust, indeed, is founded on a populist tradition, a tradition quite at odds with the scientific rationality that informs economic theory and that tradition, which shows itself persistently in legislative developments, makes its own legitimate claim on judicial attention and, viewed quite pragmatically, has its effects on the developing law which the lawyer cannot ignore even if the economist can or must.

of thought exist as to both the desirability of the antitrust laws and the extent to which they should be enforced or extended.[19] Leaving enforcement solely in the hands of the current administration could, under permissive administrations, result in meritorious cases being artificially withheld from judicial consideration. Having both private and public enforcement mechanisms thus better ensures that the judiciary will be given the opportunity to consider all possible violations of the antitrust laws and not only the ones the administration selects for prosecution.

The need for private antitrust enforcement actions to supplement governmental actions has increased with changes in administrations.[20] Statistics show that while merger activity levels expanded greatly during the period between 1981 and 1985, the government brought fewer actions than in preceding periods when fewer mergers took place.[21] The government's diminished intervention in merger activity can be explained in several ways.

First, the regulatory policies of government agencies vary according to the perspectives of its personnel. In 1969, Richard W. McClaren, as head of the Nixon Administration's Antitrust Division challenged 30% of all large mergers in manufacturing and mining. This action was in response to congressional concerns that mergers resulting in high concentration levels lessened competition and posed the threat of monopoly activities.[22]

In 1981, President Reagan appointed William F. Baxter as antitrust chief and Dr. James Miller III as chairman of the Federal Trade Commission.[23] Both adhere to principles of the Chicago School of economics. Chicago School economists theorize that mergers result-

---

Id. at 11.

19. *See infra* note 39.

20. *See infra* notes 22-25 and accompanying text.

21. Mueller, *Wrong Signals on Antitrust*, N.Y. Times, Aug. 4, 1986, at A17, col. 2. Professor Mueller stated that the Justice Department challenged only 28 mergers between 1981 and 1985 whereas during the less active period between 1976 and 1980, the Department challenged 39 mergers. He concluded that the Reagan administration has abandoned prosecution of many violators based on the "Chicago School" rationale that mergers "almost invariably promote efficiency; dominance of a market by one of a few firms is unlikely to harm competitors or consumers; and government is the prime source of monopoly." *Id.* at A17, col. 2. Professor Mueller criticized the federal agencies' acceptance of this school of thought, with economic studies showing that "mergers among large companies increase inefficiency and that companies with high market share usually charge higher prices than companies with a smaller share of any particular market." *Id.* at A17, col. 2.

22. Mueller, *A New Attack on Antitrust: The Chicago Case*, 18 ANTITRUST L. & ECON. REV. 29 (1986) (text of an address Professor Willard F. Mueller gave at the University of Florida, April 4, 1986).

23. *Id.*

ing in high concentration levels are not necessarily harmful to the economy and may result in increased efficiency and greater competitiveness.[24] Because governmental interference with business decisions to acquire other firms is inconsistent with this philosophy, it is not surprising that between 1981 and 1984 the Federal Trade Commission declined to initiate investigations into a single conglomerate merger, nor were any challenges made to vertical mergers.[25] The

---

24. *Id.* According to the proponents of the Chicago School, economic efficiency is the primary goal of the antitrust laws. Because the Chicago School proponents assume that firm decisions to merge are based on profit-maximization, mergers may result in increased efficiencies in the market and lead to procompetitive results. Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION, THE NEW LEARNING 64 (1974). *But see* Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, in ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 83 (1984) (emphasizing the need for antitrust policies to be in accord with the expressed congressional intent behind passing the antitrust laws). Mr. Spivack stated that Congress intended:

> to prohibit resale price maintenance, tie-ins by firms with market power over a tying product, and predatory pricing by dominant firms—irrespective of any supposed theoretical demonstration that such practices are unlikely to result in a deadweight loss as shown on an economist's graph. The Supreme Court's antitrust cases have generally been consistent with the congressional objectives. . . .
>
> . . . .
>
> - to preserve a deconcentrated industrial structure;
> - to disperse economic power;
> - to provide free access to markets;
> - to foster individual economic freedom;
> - to encourage local ownership of business;
> - to provide self-policing markets and thus reduce the need for governmental control;
> - to promote fairness in economic dealings; and
> - to lessen inequalities in economic conditions.

Id. at 84-85 (footnotes omitted).

Mr. Spivack further argued, "If this [Chicago School] view of the antitrust laws were to prevail, it goes almost without saying that dozens of the Supreme Court's antitrust decisions would have to be overruled." *Id.* at 84. For a discussion of the differences between the Chicago and Harvard Schools regarding antitrust policies and an argument that the two schools of thought are converging, see Posner, *The Chicago School of Antitrust Analysis*, in ANTITRUST LAW AND ECONOMICS 17 (O. Williamson ed. 1980). For an excellent overview and enumeration of criticisms directed at the Chicago School, see Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985). Professor Hovenkamp noted that the Chicago neoclassical efficiency model's fallacy is its reliance upon static market concepts. "That notion both overstates the ability of the policymaker to apply such a model to real world affairs and understates the complexity of the process by which the policymaker must select among competing policy values." *Id.* at 284.

25. Mueller, *supra* note 22. Professor Mueller noted that the agencies successfully challenged a number of horizontal mergers. These challenges, however, were "largely paper victories that ended with consent decrees permitting the mergers after requiring modest partial divestiture." *Id.* at 34. The federal agencies failed to challenge other mergers that clearly violated the Department's merger guidelines; for example, Pepsi Cola's acquisition of Seven Up, and Coca Cola's acquisition of Dr. Pepper:

incumbent administration's attitude toward big businesses and the antitrust laws clearly influences governmental enforcement actions. In contrast, private enforcement actions are immune to the philosophical changes that come and go with different administrations.

The Department of Justice's adoption of new merger guidelines has also contributed to the declining numbers of governmental challenges to mergers. The new guidelines utilize the Herfindahl-Hirschman Index (HHI) to measure industry concentration levels.[26] As contrasted with the prior guidelines, the HHI results in a higher threshold point of concentration which must be met before the Department will challenge a proposed merger.[27] The Department, therefore, may now decline to challenge mergers in markets with postmerger four-firm concentration ratios above 70%.[28] Yet, under the 1968 guidelines the Department would have challenged these mergers, and according to contemporaneous judicial decisions, these same concentration levels resulting from horizontal mergers may have been condemned.[29]

An additional consideration affecting governmental abilities to

---

> The merger guidelines declare that: "The department is likely to challenge any mergers in [markets with Herfindahl indexes over 1,800] that produce an increase . . . of more than 50 points. . . ." The soft-drink industry had a premerger Herfindahl index exceeding 2,500. Pepsi Cola's acquisition of 7-Up would increase the Herfindahl index by about 300 points and Coca Cola's acquisition of Dr. Pepper would increase the Herfindahl index by about 550 points.

Id. at 59-60 n.3.

26. Kauper, *The 1982 Horizontal Merger Guidelines: of Collusion, Efficiency, and Failure*, 71 CALIF. L. REV. 497 (1983). The Herfindahl-Hirschman Index (HHI) calculates concentration by adding together the square of the percentage market share of each competitor. Where this figure exceeds 1800, the Justice Department will probably challenge any merger adding 50 to 100 points (calculated by multiplying the product of the market shares of the merging companies by two) to the HHI. *Id.* at 510-14.

27. Sullivan, *The New Merger Guidelines: An Afterword*, in ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 319, 324 (1984).

28. The Justice Department, in the face of conflicting economic studies and the difficulties of proving potential anticompetitive effects from mergers, errs on the side of nonintervention where the HHI measure is between 1000 and 1800, and where mergers above that level increase the HHI by less than 100 points (roughly the equivalent of four-firm ratios ranging from 50 to 70 percent). Kauper, *supra* note 26, at 516.

29. *Id.* Professor Kauper discussed United States v. General Dynamics Corp., where the Supreme Court recognized a four-firm concentration ratio of less than 70 percent as sufficient to make out a prima facie case of antitrust violation. 415 U.S. 486 (1974). He also cited Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert denied*, 102 S. Ct. 1490 (1982) and United States v. Amax, Inc., 402 F. Supp. 956, 958-59 (D. Conn. 1975) as other examples of cases where violations were found based upon concentration levels below the high-end threshold levels of the Department's guidelines. For a discussion on how the HHI calculates firm market shares and the general standards set by the guidelines to challenge horizontal mergers, see R. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS 248-49 (1985).

thoroughly enforce antitrust laws and increasing the need for private enforcement is the lack of adequate government resources. Regardless of the administration's philosophy, the Department of Justice and the Federal Trade Commission do not have the ability to prosecute every acquisition that threatens reduced competition.[30] When the Department of Justice decides which cases to bring, it would logically select those cases where the government is most likely to prevail on the merits. Cases that fall below the new HHI standards may be more costly and time-consuming to prove, and pose a higher risk of failure on the merits than those cases meeting the guidelines' threshold. The government, therefore, is less likely to challenge mergers below the HHI threshold, even though the acquisitions involved threaten to lessen competition.

Yet, because it is difficult to separate the firms and return the industry to a competitive status once the merger has been consummated, allowing potentially illegal mergers to go unchallenged often results in irreparable damage to the market.[31] Thus, in light of decreased governmental challenges to proposed mergers, granting standing to private parties to enjoin potentially illegal mergers prior to consummation has become an even more important component of antitrust policy.

B. *Section 7 of the Clayton Act: Preventing Concentration in Its Incipiency*

According to some economic theorists, when the number of sellers in a particular market increases, the likelihood that they will try to undercut competing prices also increases, while their ability to achieve coordinated behavior decreases.[32] Conversely, the fewer the number of sellers, the more likely they are to recognize the mutual advantage of explicitly or implicitly coordinating their behavior and

---

30. Note, *The Use of Divestiture in Private Antitrust Suits*, 43 GEO. WASH. L. REV. 261 (1974). The author noted that:

> The need for private suits resulted from the practical limitations on the Government's capacity to enforce the antitrust laws. With limited resources, the Department of Justice and the Federal Trade Commission cannot prosecute every antitrust violation. Moreover, the Government, under political pressure or in an effort to maintain a consistent enforcement policy, may refuse to act for largely extra-legal reasons. Under such circumstances, a private party's sole recourse against illegal competition may be a private antitrust action.

Id. at 263-64 (citations omitted).

31. *See infra* note 56 and accompanying text.

32. R. BLAIR & D. KASERMAN, *supra* note 29, at 192; L. SULLIVAN, *supra* note 18, at 331-43.

prices which leads to a near monopoly outcome.[33] This type of market structure—where a small number of firms control a high percentage of market share enhancing their ability to tacitly or overtly engage in noncompetitive pricing decisions—is called an oligopoly.[34]

There are conflicting theories regarding the degree of harm oligopolies cause as well as what percentage level of concentration within a particular market constitutes an oligopoly that would raise antitrust concerns.[35] The "Chicago School" approach to oligopoly suggests that an industry characterized by high levels of concentration has the potential for substantial welfare gains. The focus is upon price theory and attaining economic efficiency.[36] Thus, proponents of this school observe that certain industries require concentrated markets to achieve the highest level of economic efficiency through large economies of scale.[37] Accordingly, the existence of oligopolistic market

---

33. Professors Blair and Kaserman pointed out that:

> When only a few firms populate an industry, the firms inevitably must recognize that the industry structure causes interdependent pricing. Each firm knows that its optimal price is a function of the price charged by its rivals. Under these circumstances, it would be silly to expect the firm to ignore the obvious and blithely act as though they were totally independent.

R. BLAIR & D. KASERMAN, *supra* note 29, at 200.

34. Due to their consciousness of interdependence, oligopolistic industries decrease competition in the market resulting in harm to the economy as well as to the consumer. Characteristics observed in oligopolistic markets are:

> that prices tend to be too high and output too low; that rivalry tends to take forms which we should not hesitate to characterize as socially unwholesome; that overcapacity tends to persist; that prices are not adequately responsive to changes in cost or demand; that price discrimination is widely prevalent.

L. SULLIVAN, *supra* note 18, at 347 (footnotes omitted).

35. R. BLAIR & D. KASERMAN, *supra* note 29, at 252-53; Miller, *Measures of Monopoly Power and Concentration: Their Economic Significance*, in BUSINESS CONCENTRATION AND PRICE POLICY 119 (1955) (discussing different indexes used to determine monopoly power); Rosenbluth, *Measures of Concentration*, in BUSINESS CONCENTRATION AND PRICE POLICY 57 (1955) (an overview of indexes used to measure concentration); Scitovsky, *Economic Theory and the Measurement of Concentration*, in BUSINESS CONCENTRATION AND PRICE POLICY 101 (1955) (The author argues that measurements of concentration based on effects do not accurately determine the degree of oligopoly.); *see infra* note 39.

36. R. BORK, THE ANTITRUST PARADOX 163-224 (1978); Posner, *supra* note 24, at 24.

37. R. BORK, *supra* note 36, at 163-97. Judge Bork stated that oligopolistic behavior:

> rarely results in any significant ability to restrict output. . . . [M]ost mergers would not involve any dead-weight loss, and even large mergers involving fewer than all significant rivals in the market would rarely increase the slope of the firm's demand curve enough to pose a serious problem. The effect would usually be outweighed by cost savings.
>
> . . . [S]ince mergers may very well create substantial new efficiencies, we are in an area of uncertainty when we ask whether mergers that would concentrate a market to only two firms of roughly equal size should be prohibited. My guess is that they should not and, therefore, that mergers up to 60 or 70 percent of the market should be permitted. . . .

Id. at 221.

structures are not perceived as a threat to the vitality of particular industries, and in fact, are encouraged to promote greater economic efficiency and gains to consumers.

Advocates of the "Harvard School" of economics have a very different view of the effects of oligopoly. They rely upon studies showing that an oligopoly market structure results in "significantly higher profit rates [and larger] minimum efficient sizes and capital requirements."[38] In creating those effects and increasing the threat of predation by leading firms in the industry, Harvard School economists conclude that an oligopoly discourages new entrants into the market while harming smaller existing companies.[39]

Studies of the automobile industry as representative of oligopolistic industries indicate that price leadership is another common characteristic of an oligopolistic market.[40] Price leadership occurs where a small number of firms control high percentages of market share causing them to recognize their interdependence.[41] When one firm (usually the leading firm) raises its prices, the others simply follow, without the need for overt collusion. If one of the competitors refuses to follow and tries to increase its market share by selling at a lower price, the leading firms can use their collective market power to retaliate, preventing the independent firm's efforts from succeeding and

38. White, *Searching for the Critical Concentration Ratio: An Application of the "Switching of Regimes" Technique*, in STUDIES IN NONLINEAR ESTIMATION 68 (1976) (citation omitted); *see also* H. GOLDSCHMID, H. MANN & J. WESTON, INDUSTRIAL CONCENTRATION: THE NEW LEARNING (1974) (discussing the "structuralist" thesis of market behavior—industrial structure determines the competitive behavior of firms within the industry). The editors noted that antitrust enforcement policies should be directed at reforming structural conditions of particular industries to ensure competitive performance as opposed to emphasizing solely individual elements of monopolistic practices such as price fixing, and price leadership.

39. *Id.* For a discussion of schools of thought that disagree with the theory that oligopolies necessarily result in anticompetitive monopoly practices, see R. BLAIR & D. KASERMAN, *supra* note 29, at 202-04 (discussing one view that the rational oligopolist behaves similarly to a competitive firm); L. SULLIVAN, *supra* note 18, at 333 (noting different theories regarding the performance of firms in oligopolistic markets and the emphasis upon efficiency of Judge Bork and the Chicago School economists); Spivack, *supra* note 24, at 184 (the Chicago perspective is that the objective of antitrust laws is to prevent "deadweight loss").

Authorities have also disagreed whether predatory pricing practices actually develop from oligopolistic market structures. R. BORK, *supra* note 37, at 149-55. Judge Bork argues "that predatory price cutting is most unlikely to exist and that attempts to outlaw it are likely to harm consumers more than would abandoning the effort." *Id.* at 155; *see also* Matsushita Elec. Indus. Co. v. Zenith Radio, Corp., 106 S. Ct. 1348, 1357 (1986) (Predatory pricing conspiracies are unlikely to occur because "the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition.").

40. White, *A Legal Attack on Oligopoly Pricing: The Automobile Fleet Sales Case*, 9 J. ECON. ISSUES 271-(1975).

41. L. SULLIVAN, *supra* note 18, at 339-41.

eventually forcing it to conform. Thus, even though the firms do not enter into explicit price fixing agreements, their behavior results in the same pricing evils that the prohibition against express price fixing agreements seeks to prevent.[42]

Market structures characterized by high concentration levels also harm consumers by resulting in less product variety and decreased innovation in products and services than in competitive markets.[43] In competitive markets, innovation and product variety are often used to increase sales and market share. An oligopolist, however, must consider that offering a second product variety (which inevitably increases its costs) may result in retaliation from the other leading firms diminishing the profits it already earns.[44] Therefore, according to the Harvard School of economic theory, unless leading firms in highly concentrated markets are able to engage in price discrimination with different product varieties, their tendency will be to offer nonoptimal varieties.[45]

The same disincentive that limits product variety also causes decreased product innovation.[46] Economists have associated competitive market structures with increased development and promotion of new products. Empirical studies indicate that an oligopolistic market structure also decreases incentives for technical progress by decreasing competition.[47] Thus, the Harvard School contends that many undesirable characteristics result from high levels of concentration. The fewer the number of sellers and the higher the concentration in the top four firms, the more the results of the oligopoly come to approximate a monopoly market structure.[48]

Recent statistical studies have indicated that industries in which the four largest firms have a total market share of 56% or more are characterized by significantly higher profit levels than industries

---

42. *Id.*

43. White, *Market Structure and Product Varieties*, 67 A. ECON. REV. 179 (1977) [hereinafter White, *Market Structure*]; White, *A Note on the Influence of Monopoly on Product Innovation*, 86 Q.J. ECON. 342 (1972) [hereinafter White, *Influence of Monopoly*].

44. White, *Market Structure*, *supra* note 43, at 179.

45. *Id.*

46. White, *Influence of Monopoly*, *supra* note 43 (A monopolist will not be as likely to use a sleeping patent which could lead to creation of a new product.). *But see* Swan, *Market Structure and Technological Progress: The Influence of Monopoly on Product Innovation*, 84 Q.J. ECON. 627-38 (1970) (arguing that the interest of the monopolist will be to introduce new products at the same time as competitive firms). For a discussion of the conflicting theories regarding the effect of market structure on product innovation and a comparison of Professors Arrow and Demsetz's empirical studies, see generally R. BLAIR & D. KASERMAN, *supra* note 29, at 41-45.

47. R. BLAIR & D. KASERMAN, *supra* note 29, at 41.

48. *Id.* at 192-225.

below that threshold.[49] These studies indicate to some Harvard School economists that 56 to 59% is the critical four-firm concentration ratio above which an oligopoly adversely affects competition in the industry.[50] Yet other schools of thought, such as the Chicago School, would advocate not challenging mergers causing concentration at these levels. In addition, under the HHI merger guidelines, mergers in the 56 to 59% range would probably no longer be challenged in governmental actions.[51]

Congress, however, intended section 7 of the Clayton Act[52] to

---

49. White, supra note 38, at 61. Professor White's study in nonlinear estimation used the "switching regimes" technique. This technique uses two sets of assumptions in solving equations to match variables with different values under different circumstances. *Id.* at 62-64.

50. *Id.* Other studies confirmed the critical concentration levels found in this study:

> It is interesting to note that the switching point of 56-59 percent reported here is quite close to the point (55 percent) found by Meehan and Duchesneau (1973) and not too far from the point (50 percent) found by Rhoades (1973), though these authors used different models, data sources, and techniques. Further, the four firm concentration ratio switching point of 56-59 percent corresponds closely to an eight firm concentration ratio of 70-72 percent. . . . Thus, Bain's original findings do seem to be confirmed on new data and with a more sophisticated model.

Id. at 72. *See generally* Brozen, *Bain's Concentration and Rates of Return Revisited,* 14 J.L. ECON. 351 (1971) (Bain's study found higher profit rates in industries with an eight-firm concentration ration of 70%.); Meehan & Duchesneau, *The Critical Level of Concentration: An Empirical Analysis,* 22 J. INDUS. ECON. 21 (1973) (switching point is 55%); Rhoades & Cleaver, *The Nature of the Concentration-Price/Cost Margin Relationship for 352 Manufacturing Industries: 1967,* 40 S. ECON. J. 90 (1973) (switching point is 50%).

51. *See supra* note 28 and accompanying text.

52. Section 7 of the Clayton Act provides in relevant part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, *where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*

Clayton Act § 7, 15 U.S.C. § 18 (1982) (emphasis added). The original section 7 did not extend to asset acquisitions. Congressmen, therefore, criticized the section for leaving a substantial loophole open to potential antitrust violators:

> [I]t would have been much better for the economy of the country to have repealed Sections 7 and 11 of the Clayton Act rather than let this wide-open loophole to remain. Most of the large and monopolistic mergers which have become detrimental to the free-enterprise system of our Nation have occurred by way of this plain evasion of the intent of the original Clayton Act.

96 CONG. REC. 16,451 (1950) (statement of Sen. Kefauver). Thus, Congress passed the Celler-Kefauver Act in 1950 amending Section 7 to prohibit asset acquisitions and statutory mergers of corporations where the effect of such mergers may be to lessen competition substantially. Celler-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (amending Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1982))). For a discussion of

stop potential monopolies in their initial stages.[53] Congress acted in response to what it perceived as a rising tide of concentration that increased the possibility of collusion, resulting in dangerous economic, political, and social effects in the market.[54] Section 7 was intended to stop this tide of concentration by preventing large mergers from placing economic and financial power in fewer hands creating an oligopolistic market structure and lessening competition.[55]

In order to achieve its purpose, Congress recognized that it was necessary to take action prior to the completion of mergers where the likely result was a substantial lessening of competition. Once a merger has been consummated, it is difficult to gain adequate relief through postmerger litigation because often the blending of identities of the acquired and acquiring firms is irreversible.[56] Divestiture is expensive and the courts rarely decree such relief; additionally, it sel-

---

the 1950 amendment of section 7, its legislative history, and possible implications, see D. MARTIN, MERGERS AND THE CLAYTON ACT 305-10 (1959).

53. H.R. REP. NO. 1373, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2639-41; D. MARTIN, *supra* note 52, at 315-26.

54. The history of the passage of section 7 reveals that Congress's "belief that democracy can be preserved only by dispersing and decentralizing economic and financial power, together with other dismaying records of turn-of-the-century monopolistic excesses that were unchecked by the Sherman Act, directly led to the enactment of section 7 of the Clayton Act in 1914." H.R. REP. NO. 1373, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2639 (footnote omitted); *see also* ABA ANTITRUST SECTION, MONOGRAPH NO. 7, MERGER STANDARDS UNDER U.S. ANTITRUST LAWS 21-23 (1981) (noting that Representative Celler presented statistics to Congress showing that 45 corporations controlled a total of 1 percent of the country's corporate assets). Additionally, Representative Douglas showed that between 1915 and 1945 mergers resulted in 76% of the long-term growth in the copper industry and 84% of the steel industry's growth. *Id.*

55. H.R. REP. NO. 1373, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2639-41. Representative Carlin interpreted section 7 as strengthening the Sherman Act by extending the antitrust laws to cover acts resulting in decreased competition as opposed to only those acts resulting in actual restraints of trade. 51 CONG. REC. 9045, 9070 (1914).

> Under this bill there has to be only a lessening of competition. Competition may be lessened without restraint of trade. Competition may be lessened without attempt to monopolize. Competition may be lessened without conspiracy. It may be the natural effect of the putting together in close relationship through a holding company of two corporations that are natural competitors, or ought to be.

Id. at 9271 (statement of Rep. Carlin).

56. The legislative history of section 7 stressed the need to stop large mergers prior to consummation because once the merger is completed and antitrust violations have occurred:

> it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged.

H.R. REP. NO. 1373, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2637, 2640.

dom restores the acquired firm to its premerger level of competitiveness.[57] Thus, divestiture can result in even greater harm to the market.

In accordance with congressional intent, the Supreme Court in *Brown Shoe v. United States* held that section 7 is concerned with "probable effects" upon the market from a merger; it does not require a showing of "certain" anticompetitive effects.[58] In determining the likelihood of anticompetitive effects, the courts are to look at a particular company's percentage of the market share within a given area. Where a merger would result in a firm controlling an undue percentage of market share and would result in a significant increase in concentration, a court should prohibit the acquisition on the grounds that it "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[59]

Section 16 of the Clayton Act authorizes private parties to seek protection from an impending violation of section 7 and to obtain injunctive relief upon a showing of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[60] Because the purpose of seeking relief under section 16 is to prevent threatened damage, the courts have not required private parties to show actual injury to business or property.[61] The only requisite for a private

57. *Id.* at 9; L. SULLIVAN, *supra* note 18, at 669-73. One commentator noted various court decisions disallowing divestiture as a remedy under sections 7 and 16 of the Clayton Act. Note, *supra* note 30, at 261 (citing Continental Securities Co. v. Michigan Cent. R.R., 16 F.2d 378 (6th Cir. 1926); American Commercial Barge Line v. Eastern Gas & Fuel Assoc., 204 F. Supp. 451, 453 (S.D. Ohio 1962); Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 107 F. Supp. 532, 542 (S.D.N.Y. 1952), *rev'd on other grounds*, 202 F.2d 731 (2d Cir. 1953)). He cited two cases, however, as examples of decisions wherein the courts did order divestiture as a means of restoring competition and remedying private plaintiffs' injuries. *Id.* at 261-62 (citing Calnetics Corp. v. Volkswagen of America, 348 F. Supp. 606 (C.D. Cal. 1972); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153 (D. Hawaii 1972)). *See also* Kintner & Wilberding, *Enforcement of the Merger Laws by Private Party Litigation*, 47 IND. L.J. 293 (1972) (courts are reluctant to order divestiture as a remedy under section 16 of the Clayton Act).

58. 370 U.S. 294, 323 (1962).

59. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963). Not only is the degree of concentration an indication of a substantial lessening of competition, but the Supreme Court has found that evidence of the existence of a "trend" toward concentration indicates decreased competition in a market. United States v. Pabst Brewing Co., 384 U.S. 546, 552 (1966); United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966).

60. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

61. Hawaii v. Standard Oil Co., 405 U.S. 259 (1972) (comparing the requirements for obtaining relief under section 4, which requires a showing of actual injury, with section 16, which only requires a showing of threatened injury); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969) (Plaintiffs seeking injunctive relief under section 16 of

plaintiff to have standing is a causal connection between antitrust injury and the putative antitrust violation.[62]

The Supreme Court has recognized lower standing requirements for purely injunctive actions under section 16 due to the fact that section 16 relief involves none of the risks of duplicative recovery or potentially disastrous monetary judgments which exist with the section 4 treble damage remedy.[63] Thus, to obtain standing under section 16 the Court has held that the complainant "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur."[64] Because section 7 deals with "probable effects" and the standing inquiry under section 16 is founded upon a causality analysis, a private party seeking injunctive relief against an alleged illegal merger has only been required to show that a merger will result in undue concentration within the market, and that as a result of such concentration, injury is threatened.

III. Competitors Standing: Protecting the Public Interest and Ensuring Pluralism

The existence of conflicting economic schools of thought attempting to shape antitrust doctrine increases the need to ensure pluralism in the enforcement of antitrust laws. The current administration's application of the Chicago School's neoclassical market efficiency model presents only one economic theory for the development

---

the Clayton Act "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur."); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985) (The standard a plaintiff must satisfy for an injunction to issue is a showing of "threatened" injury as a result of an antitrust violation.); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1132 (5th Cir. 1975) ("To achieve standing under § 16 the petitioner must demonstrate that he is threatened with loss or injury proximately resulting from the antitrust violation.").

62. *See supra* note 61.

63. In Hawaii v. Standard Oil Co., the Supreme Court noted that standing under section 16 differs from standing under section 4 in that section 16 requires only an injury cognizable in equity and does not involve the potential for recovery of treble damages or attorney's fees. 405 U.S. 259, 260 (1972); *see also* Midwest Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 576 (3d Cir. 1979) ("[A] claim for injunctive relief does not present the countervailing considerations—such as the risk of duplicative or ruinous recoveries and the spectre of a trial bordered with complex and conjectural economic analyses—that the Supreme Court emphasized when limiting the availability of treble damages."); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130 (9th Cir. 1973) ("[T]he broader language of section 16 lacks mention of 'business or property', an omission signalling different standing requirements. This treatment is fully justified by the difference between the remedies available under each section."); L. Sullivan, *supra* note 18, at 772 (recognizing the lower threshold requirement of "threatened loss or damage" in section 16 actions).

64. Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130 (1969).

of antitrust policy—a theory which several commentators have criticized for its application of static model concepts to the real world market.[65] Should standing be denied to competitors seeking to enjoin mergers that endanger competition according to the principles of other schools of economic thought, the courts will be foreclosed from examining conflicting economic views and interpreting congressional intent regarding antitrust doctrine. The danger in the courts' exposure to only one economic model of antitrust policy is that the chosen paradigm will shape the application of antitrust laws to the exclusion of other models. As one author noted: "The upshot is a vendomat jurisprudence: a model is plunked in, a legal result pops out. Wittingly or not, antitrust law comes to serve the proclivities, or gullibilities, of proponents of one or the other economic model and its hidden ideology within."[66] Antitrust policy is simply too important to allow it to be the captive of only one view or school of thought, even if the view is that of the incumbent administration.

Both the district and circuit courts in *Monfort* ruled that a competitor has standing to obtain injunctive relief against a proposed merger that would create undue concentration in an industry even though no other anticompetitive acts had yet occurred.[67] Those decisions are consistent with congressional intent as well as prior judicial decisions.[68]

The legislative history of the passage of the Clayton Act clearly established that competitors are among those private parties that Congress sought to encourage to bring suits when there were violations of the antitrust laws.[69] The fears that competitors will bring

---

65. Hovenkamp, *supra* note 24. Professor Hovenkamp criticized the Chicago school of thought stating:

> [T]he neoclassical market efficiency model is itself too simple to account for or to predict business firm behavior in the real world. The model has proved to be particularly inept at identifying many forms of strategic behavior. In large part this is so because the market efficiency model is static and dwells too much on long-run effects. In the real world, short-run considerations are critical to business planning. Furthermore, the short run can be a very long time. In many industries a monopoly that lasts only for the short run can inflict great economic loss on society. By ignoring the short run, the market efficiency model fails to appreciate the social cost of many forms of monopolistic behavior.

Id. at 284.

66. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO L.J. 1511, 1569 (1984).

67. Monfort of Colo., Inc. v. Cargill, Inc., 591 F. Supp. 683 (D. Colo. 1983), *aff'd*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986).

68. *See supra* notes 29 & 55.

69. H.R. REP. NO. 94-499, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2589. "The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or *possible competitors*) to help

unmeritorious suits to enjoin or delay proposed mergers in order to decrease competition, rather than preserve it, are diminished by (1) the courts' standing criteria, which requires a causal connection between threatened antitrust violations and injury to the competitor, and (2) procedural rules, which permit injunctive actions to be heard on an expedited basis either upon preliminary injunction motions or in advanced trial settings.[70] Few mergers need be or can be completed quickly. Thus, the benefits society may gain from ensuring that potentially meritorious cases are presented to the courts for consideration on their merits far outweighs any benefits that could be associated with a policy of dismissing such cases on standing grounds and never considering their merit.

The Tenth Circuit Court of Appeals held that the threat of predation was sufficient to grant Monfort standing because a causal connection would exist between the antitrust violation and injury to the competitor.[71] The court found that Monfort had established that it was threatened with injury as a direct result of the merger based upon the likelihood that the leading firms would engage in anticompetitive activities to increase their profits and drive smaller independent

---

enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations." *Id.* at 19 (emphasis added).

70. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2950 (1973). Federal Rule of Civil Procedure 65(a)(2) provides that a court may order a trial to be advanced and consolidated with a preliminary injunction because "the urgency that is characteristic of cases involving preliminary injunction applications makes a rapid determination of the merits especially important." *Id.*; *see also* FED. R. CIV. P. 65(a)(2).

71. Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986). The court acknowledged Monfort's claim that Excel would be able to:

> engage in what we consider to be a form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers. The resulting cost-price squeeze will, according to Monfort, reduce its profit margin and drive it and other companies out of business. Once that occurs Excel will then use its market power to charge monopoly prices for its beef. Thus, according to Monfort, the harm to competition will follow an intense, but ersatz, period of competition during which Excel will increase its market share. Although Monfort does not discuss less drastic results, it is also possible that such a pricing strategy could enable Excel to demonstrate its price leadership to its competitors and force them to follow its artificially high boxed beef prices. Such a result would probably help Monfort but hurt competition by promoting tacit collusion. Monfort contends that Excel would be better able to engage in such a sustained period of predatory pricing if it possessed the additional market power that would come with increased market share following acquisition of Spencer Beef. Thus it claims that the harm to competition, as well as the injury it will suffer as a competitor, is directly tied to the putative Clayton Act section 7 violation.

Id. at 575.

processors, such as Monfort, out of business.[72] Because of the high levels of concentration that would result from the proposed merger of Excel and Spencer Beef, the court concluded that Excel and IBP, the largest producer in the beef-packing industry, were likely to cause this price-cost squeeze in a profit-maximizing effort to increase their market shares. Thus, Monfort, as a direct competitor, as well as consumers of boxed beef and sellers of fed cattle, would suffer injury.[73]

In *Monfort*, the plaintiff-competitor proved that the beef packing industry had been experiencing a marked trend toward concentration with the two largest firms, Excel and IBP, dominating largely as a result of acquisitions by the two companies as opposed to internal expansion.[74] Monfort also provided figures indicating that the proposed acquisition would increase the four-firm concentration ratio in the input market to 57.5% and the two-firm concentration ratio of IBP and Excel to 44.8%.[75] In the output market for the industry the four-firm concentration ratio would rise to 59.5% and the two-firm concentration market share would be 47.7% if Excel consummated the proposed acquisition.[76] While such trends would be downplayed under the static analysis approach of the Chicago School,[77] the Supreme Court has previously recognized that trends toward industry concentration indicate decreased competition. Moreover, a merger resulting in a significant increase in concentration within an industry is presumed illegal.[78] Recent economic studies that place the critical point of harmful concentration in an industry at a 55% four-firm con-

72. *Id.* at 574-78.

73. The district court noted that "in the instant case, the consumers of boxed beef and the sellers of fed cattle have no motivation, in the short term, to attack the planned sale because, at least initially, it would be a direct benefit to them." *Monfort*, 591 F. Supp. at 693.

74. Monfort noted two significant developments in the beef packing industry:

> First, boxed beef was introduced in the 1960's. In the past twenty years, boxed beef has come to dominate the industry, now accounting for over 80% of all table cuts of beef purchased by retail supermarkets and the hotel, restaurant and institutional trade. Second, in a much shorter period of time, the beef packing industry has experienced a marked trend toward concentration, and with it, domination by the two largest firms: IBP, Inc. and Excel. Significantly, Excel's growth has been largely through acquisition rather than internal expansion. Most importantly, the rise of these two firms has been coupled with the demise of a multitude of smaller packing companies. Between 1978 and 1982 alone, the four-firm market share in the market for the procurement of fed cattle (the "procurement market") rose from 37.3% to 52%.

Brief for Monfort of Colo., Inc., Respondent in Opposition on Petition for Writ of Certiorari at 2, *Monfort* (No. 85-473).

75. Brief for Appellee at 23, *Monfort* (Nos. 83-2588 & 84-1305).

76. *Id.*

77. For a discussion of the fallacy of the Chicago School neoclassical efficiency model's premise based upon the static market, see Hovenkamp, *supra* note 24, at 284.

78. *See supra* note 59.

centration ratio are consistent with the courts' decisions in *Monfort*.[79] Thus, the evidence presented concerning concentration in the industry appears to justify an injunction.

But did Monfort itself stand to be injured by the increased concentration? Excel seriously questioned this issue in challenging Monfort's standing to bring suit.[80] It is true that at the point the merger was proposed, no other overt anticompetitive acts directed at Monfort had occurred. It is possible that Monfort would eventually survive and be a beneficiary of increased concentration. Monfort could itself merge with another competitor and help drive others out of the market. Or Monfort could benefit from price leadership and other quasi-collusive practices by which all of the oligopolists increase profits and decrease competitiveness and costs. Only some of these possible scenarios would harm Monfort directly even though the public interest and competition would surely suffer. Thus, Excel's argument that Monfort had no standing under these circumstances has superficial appeal. However, one of the elements the courts are required to consider when awarding injunctive relief is whether such relief benefits the public.[81] This follows from the fact that injunctive relief is intended to and generally does affect more than just the parties before the court. This public interest in injunctive actions inevitably makes such actions different than damages actions.

Courts require a litigant in treble damages actions to prove his personal losses and are careful not to allow one litigant to recover damages for injuries that another company more directly suffered.[82] Treble damages relief is a punishment and a deterrent, but paying treble damages for the same act to several different plaintiffs can decimate a company and itself harm competition.[83] Thus, in damages actions, courts must focus upon the injury that the plaintiff suffered as a direct result of the defendant's conduct.

On the other hand, in a purely injunctive action where a court is convinced that a proposed merger will harm competition and is con-

79. *See supra* note 50.

80. Excel argued that Monfort would benefit from the merger because Monfort would have fewer competitors and could take advantage of the oligopolistic market structure. Furthermore, Excel contended that all competitors should be denied standing to enjoin mergers because any injury suffered would be the result of increased competition and "antitrust laws were enacted for 'the protection of *competition*, not *competitors*.' " Monfort of Colo., Inc. v. Cargill, Inc., 761 F.2d 570, 574-75 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

81. C. WRIGHT & A. MILLER, *supra* note 70, § 2948.

82. S. OPPENHEIM, G. WESTON & J. MCCARTHY, FEDERAL ANTITRUST LAWS 1088 (1981); L. SULLIVAN, *supra* note 18, at 769-74.

83. *See supra* note 82.

trary to the public interest, predicting exactly which parties the future acquisition will harm is of less concern than it would be in a treble damages action.[84] Instead, protecting the public interest becomes paramount. If a court was required to deny an injunction because a given plaintiff-competitor could not prove with certainty that it would be a victim of the increased concentration although it established that consumers and some competitors would surely be injured, society would be relegated to trying to remedy the injury after it had occurred. It would be too late at that point to ever return the industry to a truly competitive state.[85]

Because there is no threat of duplicative recovery in injunctive actions, once the court is convinced that the proposed merger threatens competition in the industry and that the plaintiff is within a class of entities where injury to one or more of its members is likely, standing should be sufficiently established and the court should grant injunctive relief. Congress provided that section 7 should be used to prevent threats to competition in their incipiency and to prevent undue concentration which Congress perceived as a threat to the economy.[86] Thus, once a court becomes convinced that a proposed merger is harmful, it is in the public interest to issue an injunction no matter who brought the case before the court. The alternative of per-

84. C. WRIGHT & A. MILLER, *supra* note 70, § 2948. The authors noted that more liberal standards apply in granting injunctions which favor the public interest. Some courts have held that a plaintiff need not show irreparable injury nor a balance of hardship in his favor where federal statutes protecting the public interest are involved.

> The congressional pronouncement in § 7 [of the Clayton Act] embodies the irreparable injury of violation of its provisions. No further showing need be made by those directed to enforce that section than that it is being violated or threatened with violation. Nor is it necessary to demonstrate the precise manner in which violation of the law will result in injury to the public interest. * * * When the Government acts to enforce a statute or make effective a declared policy of Congress, the standard of the public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.

Id. § 2948, at 461 n.74 (quoting United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 544-45 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963)).

85. *See supra* notes 56-57 and accompanying text.

86. The Supreme Court has recognized that:

> [Congress] passed and amended § 7 on the premise that mergers do tend to accelerate concentration in an industry. Many believe that this assumption of Congress is wrong, and that the disappearance of small businesses with a correlative concentration of business in the hands of a few is bound to occur whether mergers are prohibited or not. *But it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden*, which in effect the courts would be doing should they now require proof of the congressional premise that mergers are a major cause of concentration.

United States v. Pabst Brewing Co., 384 U.S. 546, 552 (1966) (emphasis added).

mitting the public and competitors to be injured because the exact victims have not yet been identified is unacceptable.

IV. COMPETITORS: WHO ELSE WILL SUE?

Congress intended antitrust doctrine to develop as the result of interaction between the legislative, administrative, and judicial branches of government. It is vital, therefore, that all three branches have some input into policymaking processes to ensure pluralism in the enforcement and development of antitrust laws. Should courts deny companies standing to enjoin illegal mergers of competitors, the judiciary may be limited to hearing only those cases that meet the administration's threshold levels of concentration.

As the *Monfort* court indicated, consumers and suppliers who deal regularly with top firms in high four-firm concentration ratio markets have a strong incentive to maintain good relationships with those businesses and have no motivation to challenge proposed acquisitions which in the short-term will be beneficial to them.[87] Therefore, where the government fails to act, direct competitors who are faced with the prospect of losing their companies as a result of an illegal merger are likely to be the only private parties who will challenge acquisitions that tend to lessen competition and increase market concentration. It is thus appropriate that the Supreme Court affirm the lower courts' decisions in *Monfort* which granted competitors standing to bring these types of actions in order to prevent permanent damage to the public and the marketplace.

Just as a plurality of sellers enhances competition in the marketplace, a plurality of potential plaintiffs enhances competition in the ideas that shape the judiciary's evolution of antitrust policy. Monopoly is no more desirable in antitrust policymaking than it is in the economy.

MICHELLE CUERVO DUNAJ*

87. *See supra* note 73.

* I would like to thank Professor David Frankford for his invaluable suggestions. This article is dedicated to my husband, William J. Dunaj, my son, John A. Dunaj, and my family for their support and encouragement.